Summer 2012

# Prosecutorial Decriminalization

Erik Luna
*Washington and Lee University School of Law*, lunae@wlu.edu

0091-4169/12/10203-0785
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 102, No. 3

*Printed in U.S.A.*

# PROSECUTORIAL DECRIMINALIZATION

**ERIK LUNA***

## I. INTRODUCTION

As far as I can tell, Sanford Kadish coined the term "overcriminalization" in a 1962 article in the *Harvard Law Review*, where he noted the phenomenon of "criminal statutes which seem deliberately to overcriminalize, in the sense of encompassing conduct not the target of legislative concern."[1] After listing a few examples of overcriminalization, such as overly broad bans on gambling and strict liability statutes, Professor Kadish mentioned that these laws "raise basic issues of a morally acceptable criminal code," insofar as they "purport to bring within the condemnation of the criminal statute kinds of activities whose moral neutrality, if not innocence, is widely recognized."[2] He was not the first prominent scholar to articulate the basic problem, however.[3] A few years earlier, for instance, Francis Allen had noted "the sheer bulk of penal regulations," "the accelerating rate at which these accretions to the criminal law have occurred," and "the remarkable range of human activities now subject to the threat of criminal sanctions."[4] Indeed, the breadth of penal

* Sydney and Frances Lewis Professor of Law, Washington and Lee University School of Law.

[1] Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962).

[2] *Id.* at 910.

[3] At the turn of the previous century, Roscoe Pound noted "the crude and unorganized character of American legislation in a period when the growing point of law has drifted to legislation." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906). He would later point out that, "of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before." ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 23 (1930).

[4] Francis A. Allen, *The Borderland of the Criminal Law: Problems of "Socializing" Criminal Justice*, 32 SOC. SERV. REV. 107, 108 (1958).

codes and overloading of criminal justice systems were common themes of reform efforts throughout the twentieth century.[5]

Nonetheless, Professor Kadish provided a single word that crystalized the phenomenon—hardly a small accomplishment in a legal and political culture often affected by labels. In the coming years, Kadish and his contemporaries would describe various manifestations and repercussions of overcriminalization in the state and federal systems.[6] The use of criminal law to enforce public standards of private morality, as in the case of drug offenses, failed to suppress either supply or demand. Instead, drug criminalization increased black-market profits and related offenses, required police to engage in devious practices due to the covert and consensual nature of the narcotics trade, and diverted limited resources from the enforcement and adjudication of serious harms.[7] As for regulatory offenses, much of the conduct in question closely resembled business behavior that was "not only socially acceptable, but affirmatively desirable" in an economic system premised on free enterprise.[8] In these situations, "the stigma of moral reprehensibility" did not intuitively attach to the regulated behavior.[9] Rather, each addition of morally neutral conduct to the penal code further diluted the normative force of the criminal sanction.

Professor Kadish warned that, "until these problems of overcriminalization are systematically examined and effectively dealt with, some of the most besetting problems of criminal-law administration are bound to continue."[10] His prognosis remains as true today as when he offered it in 1967. As my contribution to this Symposium, I will suggest another way of looking at overcriminalization that reconceptualizes the problem and offers a second-best approach to dealing with the phenomenon's most troubling expressions. Regardless of any prescriptive possibilities, maybe the neologism itself, like the one coined by Professor

---

[5] *See* Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597 (2011).

[6] *See* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 432 (1963) [hereinafter Kadish, *Some Observations*]; Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 158 (1967) [hereinafter Kadish, *Crisis of Overcriminalization*]; *see also* NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL (1970); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 250–366 (1969); Frank J. Remington, *The Limits and Possibilities of the Criminal Law*, 43 NOTRE DAME L. REV. 865, 865 (1968).

[7] *See* Kadish, *Crisis of Overcriminalization*, *supra* note 6, at 163–65.

[8] Kadish, *Some Observations*, *supra* note 6, at 436.

[9] *Id.* at 425–26.

[10] Kadish, *Crisis of Overcriminalization*, *supra* note 6, at 158.

Kadish a half-century ago, might help people rethink the status quo. Before considering the basic idea—what I call "prosecutorial decriminalization"—the following provides some background on overcriminalization and the prospects for change.

## II. REFORM PROSPECTS

On occasion, Professor Kadish was called upon to respond to those who rejected the arguments against overcriminalization as being theoretically unprincipled or, conversely, uselessly abstract.[11] Yet today, decades after he introduced the phrase into the legal lexicon, overcriminalization is acknowledged as a serious problem—not only by academics, but also by eminent jurists, former high-ranking government officials, and organizations from across the political spectrum[12]—inspiring books, law review symposia, and congressional hearings.[13] The phenomenon can be seen as encompassing an assortment of issues, including:

- offenses deficient in clearly harmful wrongdoing (e.g., vice crimes and many non-larcenous economic offenses);
- duplicative penal provisions and novel crimes already well covered by existing law (e.g., carjacking);
- statutes passed without genuine jurisdictional authority (e.g., federal offenses with specious links to interstate commerce);
- doctrines that can expand liability to those who hardly seem blameworthy (e.g., strict liability and vicarious liability); and
- harsh punishments that bear no necessary relationship to the harm caused or threatened by the offense and the

---

[11] *See* Sanford H. Kadish, *Comment: The Folly of Overfederalization*, 46 HASTINGS L.J. 1247, 1249 (1995) [hereinafter Kadish, *Folly of Overfederalization*]; Sanford H. Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 UCLA L. REV. 719, 719 (1972).

[12] *See* Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23, 2011, at A1; Adam Liptak, *Right and Left Join to Take On U.S. in Criminal Justice Cases*, N.Y. TIMES, Nov. 24, 2009, at A1.

[13] *See, e.g., Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. (2010); GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008); IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE "THE AIMS OF THE CRIMINAL LAW" (Timothy Lynch ed., 2009); Symposium, *Overcriminalization 2.0: Developing Consensus Solutions*, 7 J.L. ECON. & POL'Y 565 (2011); Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

blameworthiness of the offender (e.g., some mandatory minimum sentencing laws).[14]

This understanding of overcriminalization, shared in whole or in part by those who seek to contain or reverse the phenomenon, is indicative of a newfound appreciation for the legitimate ends of criminal law. With a convergence of opinion, the discussion inevitably turns to a search for answers—and just as inevitably, two solutions have been offered by scholars and reformers. The first option would be for lawmakers to address overcriminalization by trimming the penal code, with a scalpel in some places and a hatchet in others. This approach seems preferable to all others, given that a legislature possesses the most straightforward means to deal with the problem. Besides, lawmakers are the ones who created the mess to begin with, by continually expanding the reach of criminal justice systems, enacting new crimes, providing for harsher punishments, and broadening culpability principles, often in the absence of deontological or empirical justification and without regard for statutory redundancy or jurisdictional limitations. A variation on this theme calls for the depoliticization of at least the initial steps of criminal lawmaking by shifting responsibility for defining crimes and setting punishments in the first instance from lawmakers to non-political criminal justice experts.[15]

The second option involves the imposition of the judiciary as a check on overcriminalization. Over the years, this approach has been advocated by a number of leading scholars, each offering his or her own theory of judicial review. Among others, the late, great William Stuntz considered the potential of constitutionalizing substantive criminal law—through a minimum mens rea requirement, for example, and revitalized rules of desuetude and notice—all as a means to limit the power of lawmakers to ban and punish conduct.[16] In a subsequent article, Professor Stuntz suggested a prerequisite of regularized enforcement, where the government would have to show that a sufficient number of similarly situated defendants had been convicted of the crime charged against the accused, and that a minimum number of factually analogous cases resulted in

---

[14] *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704–17 (2005) [hereinafter *Overcriminalization Phenomenon*].

[15] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 582–87 (2001) [hereinafter *Pathological Politics*]. In his article, Professor Stuntz was not advocating the depoliticization approach. Indeed, he suggests that "expert-driven criminal law is a practical impossibility." *Id.* at 585.

[16] *See id.* at 587–98; William J. Stuntz, *Substance, Process, and the Civil–Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 31–38 (1996); *see also* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 530–70 (2004); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CALIF. L. REV. 335, 358–93 (2000).

sentences as severe as the one imposed in the case at bar.[17] Such proposals make a great deal of sense in light of the fundamental role of the judiciary as a countermajoritarian safeguard against political excesses.[18]

Unfortunately, neither of these overarching solutions has had much traction, due in large part to the dysfunctional political process that expands but never contracts the criminal justice system. In 1995, Professor Kadish summed up the typical cycle of "creeping and foolish" overcriminalization:

> Some dramatic crimes or series of crimes are given conspicuous media coverage, producing what is perceived, and often is, widespread public anxiety. Seeking to make political hay, some legislator proposes a new law to make this or that a major felony or to raise the penalty or otherwise tighten the screws. Since other legislators know well that no one can lose voter popularity for seeming to be tough on crime, the legislation sails through in a breeze. That the chances of the legislation working to reduce crime are exceedingly low, and in some cases the chances of it doing harm are very high, scarcely seems to be a relevant issue.[19]

In this sadly familiar account of criminal justice politics[20]—one which is consistent with the sociological theory of "moral panics," the measured impact of sensational crime stories, and the collapse of the harm principle as a legislative limit[21]—new offenses and harsher punishments become means to placate constituents and make fodder for reelection campaigns. There is also a "deeper politics, a politics of institutional competition and cooperation," Professor Stuntz argued, that "*always* pushes toward broader liability rules, and toward harsher sentences as well."[22] Lawmakers have an incentive to take symbolic stands through criminal law, and law enforcers have an interest in disposing of cases and obtaining convictions. All of this can be achieved by restricting more behavior (and restricting it in more ways) and increasing sentences, which leads to more and cheaper convictions via plea bargaining. Together, lawmakers and law enforcers have a powerful predisposition toward overcriminalization.

For its part, the third branch has done virtually nothing to curb the phenomenon, having all but abandoned the field of constitutional criminal

---

[17] *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 838–43 (2006) [hereinafter *Political Constitution*].

[18] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 16–17, 34–35 (1996); Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 824 (1999).

[19] Kadish, *Folly of Overfederalization*, *supra* note 11, at 1248–49.

[20] *See* Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 783 (2012).

[21] *See, e.g.*, Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 110 (1999); Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 81–86 (2009).

[22] Stuntz, *Pathological Politics*, *supra* note 15, at 510.

law. Outside of a few areas—most notably, freedom of expression, procreative rights, and the death penalty—the courts have been hesitant to limit lawmakers in their enactment of crimes and punishments. At its essence, adjudication in the United States is a conservative endeavor, constrained by notions of *stare decisis* and the obligation to justify deviations from past precedent.[23] Perhaps more than its co-equals, the judiciary is cognizant of its own institutional limitations.[24] The courts are also "haunted" by the "ghost of *Lochner*"[25] and thus careful to avoid the semblance of a super-legislature. As a practical matter, judicial reticence to counter overcriminalization may be partially attributed to the lack of clear-cut standards. For instance, at what point does a term of imprisonment become "cruel and unusual"?[26] Whatever the reason, the courts are unlikely to be a significant source of criminal law reform.

All hope is not lost, however. When the seemingly irresistible force of the new reform coalition meets the apparently immoveable object of pathological politics, something must give. With any luck, this faux paradox will be resolved by legislative action that either directly or indirectly tackles the problems of overcriminalization. The former might be foreshadowed by the Fair Sentencing Act of 2010,[27] which eliminated the mandatory five-year sentence for simple possession of crack cocaine—the first time a federal mandatory minimum had been repealed since the Nixon Administration[28]—while also reducing the sentencing disparity between crack and powder cocaine.

As for indirect reform, Senator Jim Webb introduced legislation to create a National Criminal Justice Commission. This bipartisan body would

> undertake a comprehensive review of the criminal justice system, make findings related to current Federal and State criminal justice policies and practices, and make reform recommendations for the President, Congress, and State governments to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation's criminal justice system.[29]

---

[23] *See, e.g.*, Stuntz, *Political Constitution*, *supra* note 17, at 846.

[24] *Cf.* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES ch. 2 (4th ed. 2011) (discussing limits on federal judicial power).

[25] *See* Lochner v. New York, 198 U.S. 45, 64–65 (1905); *see, e.g.*, Robert C. Post, Lecture, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1494 (1998).

[26] *See* U.S. CONST. amend. VIII.

[27] Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

[28] *See, e.g.*, Molly M. Gill, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, 21 FED. SENT'G REP. 55, 55 (2008).

[29] National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. § 4.

By all appearances, the proposed task force would be an excellent vehicle to examine overcriminalization and to suggest meaningful reforms. Given the likely stature of the commission's membership and the backing of numerous organizations,[30] the commission might provide the type of political cover needed for lawmakers to support the recommendations.

To be clear, I am optimistic, not quixotic. The entirely laudable Webb Commission has been twice blocked by lawmakers and may well die when its namesake leaves the Senate at year's end. More generally, the history of criminal justice commissions has been a mixed bag, with some well-known achievements but just as many flops.[31] As for legislative reform, the Fair Sentencing Act represents an important but small step. Further reform efforts still face the longstanding political hurdles discussed above, while at the same time institutional structures and political incentives will continue the pressure for more crimes and harsher punishments.[32] Recent events may augur certain well-crafted, targeted legislative modifications, which might set the stage for greater reforms.[33] But the political environment does not appear conducive to rapid, wholesale change to criminal law—at least not yet.

## III. PROSECUTORIAL DISCRETION

What is to be done in the meantime, during the interregnum between our overcriminalized present and a hopefully more reasonable future? Here, I would like to suggest another way of looking at overcriminalization. The relevant concept, "prosecutorial decriminalization," has both positive and normative aspects. The descriptive claim is that prosecutors have the power to decriminalize conduct and, in fact, they are already doing it en masse. The prescriptive claim is that this power, when exercised openly and pursuant to public reason, can ameliorate some of the problems of overcriminalization.

The descriptive argument is straightforward—and, I think, relatively uncontroversial—involving just a few moves. First, the prosecutorial

---

[30] *See* Letter from S. 714 Coalition Supporters to Senator Jim Webb (Sept. 15, 2010), *available at* http://www.scribd.com/doc/38089190/S-714-Coalition-Supporters.

[31] *See, e.g.*, Luna, *Overcriminalization Phenomenon*, *supra* note 14, at 730–31.

[32] *See, e.g.*, *Legislative Update*, OVERCRIMINALIZED.COM, http://overcriminalized.com/Legislation.aspx (last visited Oct. 14, 2012) (describing a Heritage Foundation project providing "details, status, and basic commentary on legislation pending in Congress that could perpetuate the dangerous trend of criminalizing more and more conduct that is socially and economically beneficial and of punishing Americans for acts they commit without criminal intent").

[33] Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 4 (2010).

function is steeped in discretion, which, as used here, simply means the power to choose between two or more courses of conduct.[34] Discretion is a "residual concept," as James Vorenberg suggested, "the room left for subjective judgment" after taking into consideration the applicable constraints, most notably, statutes and court decisions.[35] Or to use Ronald Dworkin's famous simile, discretion is "like the hole of a doughnut," which "does not exist except as an area left open by a surrounding belt of restriction."[36]

In the present context, when the legislature declares certain behavior criminal and attaches a particular punishment, prosecutors exercise virtually limitless discretion to administer the relevant code section.[37] The courts will not demand that charges be leveled; nor will they upset a prosecutor's decision to bring charges;[38] nor are judges likely to hinder plea negotiations and the concomitant agreements.[39] As then-Judge Warren Burger opined, "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought."[40] The primary legal checks are the burdens of proof to charge and convict—respectively, probable cause and proof beyond a reasonable doubt[41]—along with the obligations of pretrial and trial procedure. In practice, however, the process scuttles few cases brought in earnest.[42]

Even in a world without overcriminalization, one might expect that the scope of prosecutorial discretion would be substantial. The boundaries of language and foresight prevent a legislature from formulating rules in every law enforcement scenario. For this reason, lawmakers may prefer general terms that capture broad swaths of conduct, ensuring that wrongdoers do

---

[34] *See, e.g.*, Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1133 (2000). *See generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

[35] James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 654; *see also* Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960); Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 642 (1983).

[36] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977).

[37] Except, as mentioned previously, when a statute touches on topics such as speech and procreation. *See supra* text accompanying notes 23–26.

[38] *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1418 nn.15–16 (2010).

[39] *Id.* at 1418 n.17.

[40] Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

[41] *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); *In re* Winship, 397 U.S. 358, 364 (1970).

[42] *See* Luna & Wade, *supra* note 38, at 1418 n.18.

not escape punishment through an inadvertent loophole. The necessity of political compromise also lends itself to statutory imprecision, freeing lawmakers from having to make hard decisions that could upset voters or interest groups.[43] Moreover, vague statutes may garner more votes and take less time to navigate the legislative process, while still placating the public's desire for action.[44]

In the current reality of grotesque overcriminalization, however, prosecutorial discretion is awe-inspiring. Consider the power wielded by federal prosecutors as a result of the approximately 4,500 provisions that are punishable as crimes,[45] with the largest portion enacted *after* Professor Kadish first warned of overcriminalization.[46] In effect, the federal government has arrogated to itself a general police power to enact virtually any offense, creating an enormous criminal code—if you can call it a "code"—filled with repetitive and overlapping statutes, covering behavior already well covered by state law,[47] spinning a web of regulatory crimes,[48]

---

[43] Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 10 (1997).

[44] *See, e.g.*, Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 474–75 (1996); Kahan, *supra* note 43, at 9–11.

[45] *See* JOHN S. BAKER, JR., HERITAGE FOUND., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008), *available at* http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf. Actually, the number is probably much larger, due to the thousands of regulations that do not appear in federal statutes yet carry the possibility of criminal penalties. *See* Gary Fields & John R. Emshwiller, *Criminal Code Is Overgrown, Legal Experts Tell Panel*, WALL ST. J., Dec. 14, 2011, at A8 (quoting former U.S. Attorney General Edwin Meese); *see also Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J., July 23, 2011, at A10. Apparently, the Congressional Research Service gave up an attempt to calculate the amount of separate federal crimes on the books. *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST, July 24, 2010, at 26, 28. The Justice Department has acknowledged that the number cannot be quantified. Fields & Emshwiller, *supra* note 12 (citing Justice Department spokeswoman).

[46] *See* ABA CRIMINAL JUSTICE SECTION, REPORT OF THE ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW 7 n.9 (1998) (revealing "startling fact" that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970," and noting that "[m]uch, though not all, of this surge has occurred in the last two decades").

[47] *See, e.g.*, United States v. Welch, 327 F.3d 1081, 1090–1103 (10th Cir. 2003) (upholding, *inter alia*, a federal felony indictment for violation of Utah's commercial bribery statute, a misdemeanor under state law).

[48] *See, e.g.*, PAUL ROSENZWEIG, HERITAGE FOUND., THE OVER-CRIMINALIZATION OF SOCIAL AND ECONOMIC CONDUCT (2003), *available at* http://s3.amazonaws.com/thf_media/2003/pdf/lm7.pdf.

and extending federal jurisdiction to all kinds of deception and wrongdoing across the nation and around the globe.[49]

Although perhaps not as virulent and prone to less criticism,[50] overcriminalization has also taken place at the state level. For instance, Paul Robinson and Michael Cahill point to the Illinois Criminal Code—which is now a dozen times longer than the original code—as a case in point on the "accelerating degradation" of American criminal codes through enactment of new offenses, expansion of existing crimes, and increases in punishment.[51] Rather than employing the power to criminalize for socially beneficial purposes, most state legislatures have become "offense factories."[52]

As a result, it is not altogether hyperbolic to say that *everyone is a criminal* (or at least a potential scofflaw). In 2005, I suggested that American society may be approaching a watershed point of criminal law, what one book aptly titled "the criminalization of almost everything."[53] A few years earlier, Professor Stuntz had made a similar prediction that, absent major changes, "we are likely to come ever closer to a world in which the law on the books makes everyone a felon."[54] The basic concern actually traces back several decades. Then-U.S. Attorney General Robert Jackson observed in 1940, "With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."[55] In the new millennium, the *we're-all-criminals* idea is truer than ever, whether the public recognizes it or not. "[M]ost people think of criminals as bad

---

[49] *See, e.g.*, Luna, *Overcriminalization Phenomenon*, *supra* note 14, at 709–10. *But see* Skilling v. United States, 130 S. Ct. 2896, 2931 (2010) (limiting the scope of "honest services" fraud).

[50] As compared to the federal government, the states at least possess a constitutionally legitimate police power. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566–67 (1995).

[51] Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 172 (2003); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 635–38 (2005). Professor Stuntz made similar findings with regard to the criminal codes of Massachusetts and Virginia. Stuntz, *Pathological Politics*, *supra* note 15, at 514. *But see, e.g.*, Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 227–28 (2007).

[52] Robinson & Cahill, *supra* note 51, at 634.

[53] *See* Luna, *Overcriminalization Phenomenon*, *supra* note 14, at 746 (referring to GO DIRECTLY TO JAIL, *supra* note 15).

[54] Stuntz, *Pathological Politics*, *supra* note 15, at 511.

[55] Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

people, who deserve punishment," Judge Alex Kozinski remarked, "while not realizing that they are criminals themselves."[56]

Prosecutorial discretion thus exists within a Dworkinian doughnut that encircles us all. In wielding this discretion, prosecutors are the most powerful actors in the criminal justice system. They decide whether to accept or decline a case, and, on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed upon conviction. As such, the prosecutor *is the criminal justice system*, in effect making the law, enforcing it against the accused, adjudicating his guilt, and determining the punishment.[57]

This bears repeating. Prosecutors not only enforce the criminal code in the traditional sense, but they also effectively make law and judge cases through their discretionary decisions. Which brings me to the ultimate point: In an overcriminalized world, prosecutors are already decriminalizing conduct through their discretionary decisionmaking—as a matter of fact, they seem to have no other choice but to do so. In large district attorneys' offices, each prosecutor can have a caseload of 150 felonies per year or more; a misdemeanor caseload may be many times larger, sometimes exceeding a thousand cases per year.[58]

Needless to say, there is not enough time and resources, either in prosecutors' offices or in courtrooms, to try all of these cases. As a rule of thumb, 25%–50% of all cases referred to prosecutors are declined for prosecution.[59] Although many of these cases are dismissed outright, some

---

[56] Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE, *supra* note 13, at 44; *see also* Michelle Alexander, *I'm a Criminal and So Are You*, CNN.COM (May 18, 2010), http://articles.cnn.com/2010-05-18/opinion/alexander.who.am.i_1_law-abiding-felons-criminal?_s=PM:OPINION.

[57] *See* Erik Luna & Marianne Wade, *Preface*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE at xi, xi (Erik Luna & Marianne Wade eds., 2012).

[58] *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 270–74 (2011); *see also* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.10(c) (3d ed. & Supp. 2011). *But see* Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads*, 106 NW. U. L. REV. COLLOQUY 143, 143–45 (2011) (questioning prosecutorial caseload numbers).

[59] *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 75 (2002). The declination rate varies widely across jurisdictions and among crime categories; to the extent the information is made public, the reasons for declining cases vary widely as well. *See, e.g.*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717–20 (2010); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 130–31 (2008); Michael Edmund

may involve pretrial diversion, where charges are dismissed only after the suspect performs some task or participates in a program.[60] Either way, the cases are removed from the criminal justice system. Of the cases that do proceed further into the criminal process, more than 90% are resolved by plea bargain, which typically involves a defendant pleading guilty in exchange for reduced charges or a lesser punishment.[61]

To be sure, a prosecutor might decline a case because of insufficient proof of a suspect's guilt or the existence of some legal barrier to conviction, such as a constitutional violation by the police. But in other cases, prosecutors abstain from filing charges despite the likelihood of obtaining convictions.[62] As for plea bargaining, it is true that the eventual crime of conviction and sentence under a given agreement may reflect a more just assessment of the defendant's culpability. Still, most plea bargains result in defendants being convicted of less serious offenses and receiving reduced punishments than they might otherwise receive under the law.

In these situations, prosecutors are exercising the fullest expression of their discretion. By declining a case, the prosecutor is refusing to apply the penal code to a given suspect. By plea bargaining, the prosecutor is refusing to apply the most serious crime and the toughest punishment otherwise applicable to a given defendant. In effect, these prosecutors are engaged in *decriminalization*. This will strike some as odd, perhaps a strange way of describing or aggregating prosecutorial behavior. Nonetheless, it carries the earmarks of decriminalization, such as removing or reducing the criminal classification or status of conduct, for instance, or repealing a strict ban on certain behavior while keeping it under some type of regulation.[63] Through their discretionary decisionmaking, prosecutors are treating some conduct as non-criminal and handling other conduct as

---

O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1440 (2004); Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 252 (2003); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003).

[60] *See* LAFAVE ET AL., *supra* note 58, at § 13.1(d).

[61] *See* SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES (2009), *available at* http:bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.35.2009 (2010), http://www.albany.edu/sourcebook/pdf/t5352009.pdf (last visited Nov. 23, 2012); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 67 (2004), *available at* http://www.bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf.

[62] Wright & Miller, *supra* note 59, at 153.

[63] *See, e.g.*, *Decriminalize Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/decriminalize (last visited Nov. 23, 2012).

not quite as criminal as it could be—in other words, prosecutorial decriminalization.

## IV. COVERT DECRIMINALIZATION

This manner of decriminalization raises all sorts of problems. The plea-bargaining process is infamously coercive, due in large part to overcriminalization and, in particular, the promulgation of unforgiving sentencing provisions, often coming in the form of mandatory minimums. If the defendant refuses to plead guilty and waive his constitutional rights, a "trial tax" is exacted upon conviction: a sometimes grossly excessive penalty for exercising his rights.[64] Not surprisingly, most defendants take the plea even when they might have strong culpability defenses or arguments in mitigation.

More generally, prosecutorial decriminalization tends to be opaque, a secret law formed by the accumulation of unwritten policies, office customs, and daily practices. In a sense, it is the latent administrative law of criminal prosecution that helps account for the many actions that cannot be explained by reference to penal codes alone. Unlike real administrative law, however, most prosecutorial decriminalization occurs without the possibility of public notice and comment. Instead, it is only evident to other repeat players of criminal justice—police officers, defense attorneys, and judges—who come to realize the patterns of case declinations and the "going rate" for plea bargains.[65] Those most directly affected by prosecutorial decriminalization, criminal suspects and defendants, remain largely oblivious. But so is everyone else. If the common citizen is unaware that we are all criminals in an overcriminalized nation, he certainly will not recognize that prosecutors are decriminalizing conduct in bulk.

Because its existence and extent are unknown, prosecutorial decriminalization is not amenable to the traditional mechanisms of change in a representative democracy. Legislators and elected chief prosecutors[66] serve as professional delegates of a given constituency. For representative democracy to work—that is, for the will of the people to be served by its delegates—lawmakers and chief law enforcers must be accessible to the citizenry, responsive to popular demands, and accountable for their decisions. Without these elements, "it could well be impossible to make a

---

[64] *See, e.g.*, STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 38, 83 (2005).

[65] *See, e.g.*, Allison O. Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1594 (2011).

[66] Even unelected chief prosecutors (e.g., U.S. Attorneys) are answerable to an executive officer who is subject to the ballot box (e.g., the President).

rational case that a system is democratic."[67] In the present context, elected officials will not be held accountable for their role in prosecutorial decriminalization—whether it be overcriminalizing the system to begin with or decriminalizing conduct in turn—precisely because the public is not fully aware of the pertinent decisions and therefore cannot be expected to participate in meaningful discourse and, if necessary, to demand government reform.

The secret law of prosecutorial decriminalization is not only hard to square with a decent model of representative democracy, it also violates a widely cited interpretation of the rule of law.[68] In articulating what he called the "inner morality of law,"[69] Lon Fuller laid out the basic requirements for a legal command to be worthy of public fidelity rather than being the imposition of arbitrary power. Specifically, this conception of the rule of law embraced eight principles: (1) a law should be expressed in general terms; (2) it should be available to affected parties; (3) it should be prospective rather than retroactive; (4) it should be clear and understandable; (5) it should not produce contradictory commands; (6) it should not require the impossible; (7) it should not frequently change; and (8) it should be congruent with its enforcement.[70]

The complete failure of any of these principles "does not simply result in a bad system of law," Professor Fuller contended, but "it results in something that is not properly called a legal system at all."[71] Today's overcriminalized justice systems and the reality of covert decriminalization violate most of these principles. Of course, a system that makes everyone a criminal might rightly be seen as requiring the impossible. In addition, much of what has been described as prosecutorial decriminalization is neither available to affected parties nor understood by the general public. Most obviously, the current scheme generates a troublesome incongruence

---

[67] Carl F. Pinkele, *Discretion Fits Democracy: An Advocate's Argument*, *in* DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 3, 3 (Carl F. Pinkele & William C. Louthan eds., 1985).

[68] The rule of law is an endlessly contested idea, one that philosophers and legal scholars alike describe as "promiscuous" in its use, Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 211 (1979), "one of the most elusive concepts in the lexicon of jurisprudence," Steven G. Calabresi & Gary Lawson, *Introduction: Prospects for the Rule of Law*, 21 CUMB. L. REV. 427, 428 (1991), and "less clear today than ever before," Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1–2 (1997).

[69] *See* LON L. FULLER, THE MORALITY OF LAW 42 (1969). *See generally* Erik Luna, *Cuban Criminal Justice and the Ideal of Good Governance*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 529, 583–95 (2004) (offering a detailed discussion of the rule of law).

[70] *See* FULLER, *supra* note 69, at 39; *see also* Fallon, *supra* note 68, at 8–9 n.27 (offering similar elements for the rule of law and stating that they are consistent with Fuller's criteria).

[71] FULLER, *supra* note 69, at 39.

between the formal law and its actual administration. "It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration," argued Fuller, "but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted."[72]

In its clandestine form, prosecutorial decriminalization is not liable to behavior-shaping rules or after-the-fact review that might help prevent frequent changes in the effective law and disparate outcomes across cases. Rather, it can license ad hoc decisionmaking that results in otherwise similarly situated individuals receiving vastly different consequences. A criminal law adhocracy is bad enough, but at times the ensuing disparities can have uncomfortable associations with race and ethnicity.[73] Certainly, there might be a correlation without causation,[74] and even causal relationships may stem from something other than the classic understanding of prejudice.[75] But appearances matter in criminal law enforcement, and effect may well be taken as intent. The impression if not reality of capricious decisionmaking and invidious discrimination necessarily challenges the perceived fairness of the law and its enforcement, undermining the principal basis for compliance.[76]

Nonetheless, arguments might be made in favor of prosecutorial decriminalization, despite the fact people are unaware of its existence or, instead, precisely because the public is largely oblivious. As mentioned, law enforcement has a stake in overcriminalization. The expansion of criminal liability makes it easier to prosecute a course of conduct, and increased sentences provide defendants a powerful inducement to enter plea agreements.[77] This might seem perfectly acceptable when it leads to the capture of a dangerous criminal (e.g., the initial arrest of Timothy McVeigh

---

[72] *Id.*

[73] *See, e.g.*, John Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post*-McCleskey *Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1779 (1998).

[74] *Cf.* William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1757, 1757 (1998).

[75] *See, e.g.*, Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 536 (1997); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1022, 1025 (1988).

[76] *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

[77] *See, e.g.*, Luna, *Overcriminalization Phenomenon*, *supra* note 14, at 723–24; Stuntz, *supra* note 15, at 519–20, 531. As a former Justice Department official noted, "it is not surprising that the federal agency charged with preventing, solving, and punishing federal crimes is not aggressively attempting to shrink the federal code." RACHEL BRAND, HERITAGE FOUND., MAKING IT A FEDERAL CASE: AN INSIDE VIEW OF THE PRESSURES TO FEDERALIZE CRIME 1–2 (2008); *see also* United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004).

for a traffic offense), when it provides a ploy to convict the otherwise invulnerable kingpin (e.g., the prosecution of Al Capone for tax violations), or when prosecutorial decriminalization helps generate information about a criminal enterprise (e.g., the lure for an insider to "flip").

Some might argue that overcriminalization complemented by prosecutorial decriminalization enhances general deterrence by creating an "acoustic separation" of sorts.[78] The public and, in particular, would-be criminals recognize the existence of at least some areas of overcriminalization, such as broad bans and harsh punishments for drug offenses. But average citizens may not know about prosecutorial decriminalization, which is understood only by the repeat players of criminal justice. Because most individuals hear the conduct rule of full criminalization and not the decision rule of prosecutorial decriminalization, some people might be deterred from crime that they otherwise would have committed.[79]

Although these arguments may not be inherently unsound, it does seem to me that they are inadequate to outweigh the virtues of government transparency and democratic accountability. The pretexts provided by overcriminalization allow law enforcement to skirt criminal procedure guarantees, almost always to the detriment of minorities and the underclass.[80] Pretextual prosecutions may also send "muddied signals" about crime and its enforcement, providing inaccurate information to prospective offenders, government bodies, and the public at large.[81] Moreover, acts of decriminalization may at times have less to do with

---

[78] *See, e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (employing the term "acoustic separation" to the distinction between conduct rules and decisions rules in criminal law); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (same for criminal procedure).

[79] In some contexts, people might even favor a scheme of low-visibility decisionmaking in criminal justice. With regard to sentencing reform, for instance, Stephen Schulhofer once asked whether it is "inevitably wise to expose the problems and demand a political solution when the questions mix value-laden elements with empirical assessments that the public is unlikely to appreciate; when public opinion in any event is volatile, unformed, or ill-informed; when the issues are emotionally charged and socially divisive?" Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 801–02 (1980). In the end, Professor Schulhofer concluded that the force of these arguments "seems to me insufficient to override the traditional virtues of exposure and accountability in the context of the current debate over sentencing reform," although he found "it unnecessary to consider the more elusive question whether low visibility techniques, even if attractive on tactical grounds, are consistent with accepted principles of democratic government." *Id.* at 803, 806.

[80] *See* Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2009 CATO SUP. CT. REV. 133, 176–79.

[81] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 586 (2005).

serving justice than serving a prosecutor's self-interest, whether it be enhancing career prospects by amassing convictions and aggregate sentences—more "notches on the gun," to use a phrase from Ed Meese's keynote address—or simply lightening the caseload to avoid stress and overtime.[82] As for the aforementioned deterrence argument, even the instrumentally minded among us might find unpalatable the exploitation of an unwitting citizenry for purposes of crime control.[83] After all, no one likes being duped by the government.[84]

## V. OVERT DECRIMINALIZATION

For these and other reasons, the secret law of prosecutorial decriminalization presents a crisis of legitimacy. But what if the decisionmaking process was open and honest, not hidden from the general population and those individuals subject to its strictures? Imagine an elected district attorney conveying to his constituency the rules or principles that will be used in exercising prosecutorial discretion, stating with a degree of specificity the conditions under which his office will not prosecute particular crimes or seek certain punishments. This type of overt prosecutorial decriminalization might avoid the aforementioned problems associated with secrecy, and, conceivably, it could better serve some of the core values of the rule of law.

Like the critique of overcriminalization, there is a scholarly pedigree to the idea of articulating the grounds for exercising prosecutorial discretion. "Would it not be a helpful addition," Frank Remington asked a quarter century ago, "to try to specify those [criminal] provisions that should be fully enforced and those allowing discretion to enforce and, if discretion is allowed, indicate by whom that choice can be made and in accordance with what standards?"[85]

---

[82] *See, e.g.*, Erik Luna & Marianne Wade, *Looking Back and at the Challenges Ahead*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 57, at 434.

[83] The practice also has an uncomfortable resemblance to the enforcement of England's "bloody code" of the eighteenth century and the doctrine of crime by "analogy" in communist dictatorships, both of which sought to cow the masses into conformity. *See* Douglas Hay, *Property, Authority and the Criminal Law*, *in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17 (Allen Lane ed., 1975); Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 208–10 (1993).

[84] Then again, some people may prefer to adopt a "sausage theory" of criminal justice: they don't want to know how law enforcement is using its discretion—how the sausage is made, so to speak—they just want low crime and safe streets. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 362–63 (1993).

[85] Frank J. Remington, *The Future of the Substantive Criminal Law Codification Movement—Theoretical and Practical Concerns*, 19 RUTGERS L.J. 867, 893 (1988).

> Although some statutes should be fully enforced, an unthinking enforcement of other statutes will not add to the quality of law enforcement nor achieve the purpose the legislature had in enacting the statute. In dealing with serious crime, crimes which routinely result in arrest, the most important decisions are made by the prosecutor. . . . What the substantive law-in-action is, largely depends what the prosecutor says it is. Yet insufficient attention has been given to this fact. . . . Dealing with the issue is crucial to the achievement of a substantive criminal code, fair and effective both [on] the books and in practice.[86]

Overt prosecutorial decriminalization has not been adopted in any comprehensive fashion, but there are examples that roughly comport with the idea.

In June 2010, the new district attorney of Philadelphia, Seth Williams, launched the Small Amount of Marijuana (SAM) program.[87] Pursuant to this initiative, arrests for possession of up to thirty grams of marijuana are no longer prosecuted as misdemeanors, which could result in up to thirty days incarceration, a $500 fine, and a permanent criminal record.[88] Instead, low-level marijuana offenders in Philadelphia complete a three-hour drug-abuse class, which costs them $200, and their records are expunged. In the program's first year, more than 4,000 cases were diverted out of the criminal justice system, saving millions of dollars that otherwise would have been consumed by legal actors in court proceedings.[89] Interestingly, the SAM program was the product of a collaboration between the district attorney's office and the state judiciary,[90] both of which were seeking to reduce an overloaded criminal docket and its detrimental effects in more serious cases.[91] In addition, it has been suggested that the program could help rectify the racially skewed patterns of marijuana arrests in Philadelphia.[92]

---

[86] *Id.* at 893–94.

[87] *See* William Bender, *D.A.: Philly's New Pot Policy Just Makes Sense . . . and Saves Dollars*, PHILA. DAILY NEWS, July 8, 2011, at 6; *see also* Craig R. McCoy, Nancy Phillips & Dylan Purcell, *Philadelphia Plans Fines for Use of Marijuana*, PHILA. INQUIRER, Apr. 5, 2010, at A1; Peter Mucha, *Marijuana Leniency Starts Today*, PHILA. INQUIRER (June 8, 2010), http://www.philly.com/philly/news/special_packages/inquirer/courts-reform/20100608_Marijuana_leniency_starts_today.html.

[88] *See* 35 PA. STAT. ANN. § 780-104(1)(vii) (2003); 204 PA. CODE § 303.15 (2008).

[89] Bender, *supra* note 87.

[90] *Letters: Municipal Court Played a Big Role in Small Amount of Marijuana Program*, PHILA. DAILY NEWS, Aug. 3, 2011, at 18; McCoy et al., *supra* note 87.

[91] For instance, an investigative report had found that almost two-thirds of defendants in Philadelphia charged with violent crimes avoided conviction on all charges. Craig R. McCoy, Nancy Phillips & Dylan Purcell, *Justice: Delayed, Dismissed, Denied*, PHILA. INQUIRER, Dec. 13, 2009, at A1.

[92] *See* McCoy et al., *supra* note 87 (noting this claim, given "Philadelphia police data show" that "[m]ore than 80 percent typically have been of African Americans").

Although the prosecutor in charge of the SAM program apparently cringes at the word "decriminalization,"[93] in reality it fits the foregoing definition of prosecutorial decriminalization. By contrast, prosecutorial decriminalization of marijuana possession in Seattle, Washington, has been both unabashed and clearly supported by popular will. Local voters approved a referendum in 2003 that made marijuana the lowest priority for law enforcement, but the then-city attorney continued to prosecute possession cases.[94] In 2010, a new city attorney, Pete Holmes, came into office on a platform that included ending the prosecution of low-level marijuana possession. So although it remains a crime under state law—possessing less than forty grams is a misdemeanor punishable by up to ninety days incarceration and a $1,000 fine[95]—Seattle's local prosecutor has decriminalized this conduct with the apparent support of his constituency.

Another instance of prosecutorial decriminalization concerns the nation's toughest anti-recidivist scheme. Under California's "three strikes" law, an individual previously convicted of two serious or violent felonies (as defined by statute) who then commits another felony faces a mandatory twenty-five-years-to-life sentence.[96] The law's most draconian feature is that the last "strike" can be any felony, including petty theft with a prior larceny conviction. The resulting injustices have become embarrassing, even to some law-and-order proponents, with defendants receiving virtual life sentences for, among other things, stealing golf clubs and shoplifting videotapes.[97] After taking office in 2000, Los Angeles District Attorney Steve Cooley became the first chief prosecutor in California to announce a written policy stating that a life sentence would not be sought when the defendant's current crime is not a violent or serious felony.[98] This special directive also provided guidelines for dismissing qualifying convictions in

---

[93] *See* Bender, *supra* note 87.

[94] *See* Emily Heffter, *Seattle's New City Attorney to Dismiss Cases of Pot Possession*, SEATTLE TIMES (Jan. 15, 2010), http://seattletimes.nwsource.com/html/localnews/2010808085_marijuana16m.html; *see also* Pete Holmes, *Washington State Should Lead on Marijuana Legalization*, SEATTLE TIMES (Feb. 16, 2011), http://seattletimes.nwsource.com/html/opinion/2014247491_guest17holmes.html.

[95] *See* WASH. REV. CODE §§ 9.92.030, 69.50.4014 (2011).

[96] *See* CAL. PENAL CODE § 667 (1998).

[97] *See* Ewing v. California, 538 U.S. 11, 30–31 (2003); Lockyer v. Andrade, 538 U.S. 63, 77 (2003). Although his punishment was subsequently reduced, one defendant received a life sentence for stealing a piece of pizza. *See* Jack Leonard, *"Pizza Thief" Walks the Line*, L.A. TIMES, Feb. 10, 2010, at A1.

[98] *See* L.A. COUNTY DISTRICT ATTORNEY'S OFFICE, THREE STRIKES POLICY: SPECIAL DIRECTIVE (Dec. 19, 2000), http://da.co.la.ca.us/3strikes.htm [hereinafter L.A. THREE STRIKES POLICY]; *see also Mandatory Sentencing in California: Cooley's Law*, ECONOMIST, July 31, 2010, at 24.

other cases. "As prosecutors, it is our legal and ethical obligation to exercise this discretion in a manner that assures proportionality, evenhanded application, predictability and consistency," the directive's preamble points out. "Proper exercise of prosecutorial discretion protects society and preserves confidence in and respect for the criminal justice system."[99] Toward this end, the preamble notes that the district attorney's office will closely monitor the policy's implementation and effects.[100]

Prosecutorial decriminalization is not limited to adult defendants but also extends into the juvenile justice system. The practice of "sexting"—children sharing sexually explicit photos of themselves via cell phone or the internet—has become a widespread problem.[101] Although juveniles might not appreciate that such behavior can be criminal under child pornography laws, and despite the fact that the offenders are properly seen as victims, too, a number of jurisdictions have witnessed teens being charged for sexting.[102] But in light of "the unique characteristics and possible long term effects" of these cases, Mathias Heck, the prosecuting attorney in Dayton, Ohio, organized and implemented a program for teens accused of sexting that diverted them out of the justice system.[103] Cases are screened for eligibility using factors that might indicate serious delinquency, such as the use of force or illegal substances to obtain the photos. If eligible juveniles meet the program's requirements (e.g., relinquishing their cell phones and performing community service), charges are not filed or are dismissed. In this way, potential felonies under state law are removed from the system.[104]

Overt prosecutorial decriminalization is susceptible to a variety of critiques,[105] some intertwined with the arguments in favor of

---

[99] L.A. THREE STRIKES POLICY, *supra* note 98.

[100] *See id.*

[101] *See, e.g.*, Elizabeth C. Eraker, *Stemming Sexting: Sensible Legal Approaches to Teenagers' Exchange of Self-Produced Pornography*, 25 BERKELEY TECH. L.J. 555, 557 (2010); Elizabeth M. Ryan, Note, *Sexting: How the State Can Prevent a Moment of Indiscretion from Leading to a Lifetime of Unintended Consequences for Minors and Young Adults*, 96 IOWA L. REV. 357, 360 (2010); JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 952 (2011).

[102] *See, e.g.*, Sweeny, *supra* note 101, at 957–59; *see also* Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 513 (2008).

[103] Mathias H. Heck, *Sexting and Charging Juveniles?: Balancing the Law and Bad Choices*, PROSECUTOR, Jan.–Mar. 2009, at 29.

[104] *See id.*

[105] For instance, in the federal system, overt prosecutorial decriminalization might be seen as violating the President's responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; *see also* Kevin S. Marshall, *Free Enterprise and the Rule of Law: The Political Economy of Executive Discretion (Efficiency Implications of Regulatory Enforcement Strategies)*, 1 WM. & MARY BUS. L. REV. 235, 239 n.11 (2010)

overcriminalization and low-visibility discretionary decisionmaking.[106] The above examples also raise practical considerations. As discussed, chief prosecutors are enormously powerful officials, but they are still political actors whose decisions can be condemned by bitter opponents and undermined by other actors in the criminal justice system. When Seth Williams announced the SAM program, the previous Philadelphia District Attorney, Lynn Abraham, ridiculed his decision: "'Welcome to Philadelphia, Light Up a Joint' may just be our new slogan," she gibed. "Local gangs and marijuana growers everywhere are positively overjoyed."[107] Likewise, the Philadelphia Police Department initially appeared less than thrilled about the new program, with a police spokesman asserting that officers would continue to stop and arrest individuals for marijuana possession: "Whether or not they make it through the charging process, that's up to the D.A."[108]

Prosecutorial decriminalization can also generate questions of consistency—temporal, geographical, and topical. Consider L.A. District Attorney Steve Cooley's policy for enforcing the three strikes law. Between 2000 and 2007, his office dismissed strikes in more than 70% of the cases where defendants were eligible for enhanced sentences under the recidivist statute.[109] But this policy could not help the 1,700 or so inmates who received life sentences under Cooley's predecessor.[110] Nor does it change the approach taken by district attorneys in other California jurisdictions, including those adjacent to Los Angeles where prosecutors pursue life sentences in every eligible case.[111] Nor does an instance of overt

---

(noting similar duties on state governors). To be sure, executive officials may have no authority to refuse to perform "ministerial" duties mandated by legislation. *See, e.g.*, Kendall v. United States, 37 U.S. 524, 595 (1838); Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 184–86 (2007). But faithful execution of criminal law should not be confused with the idea of full enforcement, that is, officials must investigate all known or knowable offenses within their jurisdiction and then prosecute them to the maximum extent allowed by law. This notion has long been recognized to be a myth—one which has only become more ridiculous with each new act of overcriminalization. *See, e.g.*, PACKER, *supra* note 6, at 286; Kadish, *supra* note 1, at 907; *see also* DAVIS, *supra* note 34, at 165.

[106] *See supra* notes 77–79 and accompanying text.

[107] Mucha, *supra* note 87; *see also* McCoy et al., *supra* note 87.

[108] McCoy et al., *supra* note 87 (quoting police spokesman).

[109] *See* Michael Romano, *Divining the Spirit of California's Three Strikes Law*, 22 FED. SENT'G REP. 171, 173 (2010).

[110] *See* Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California's Three Strikes Law*, 21 STAN. L. & POL'Y REV. 311, 330 n.88 (2010).

[111] Romano, *supra* note 109, at 173. As this article was going to press, California voters adopted a ballot initiative modifying the state's three strikes law to require a life sentence only when a defendant's current conviction is for a violent or serious offense. The change

decriminalization mean that a prosecutor will advocate similar policies elsewhere or oppose overcriminalization more generally. For example, District Attorney Cooley has been an outspoken opponent of medical marijuana and threatened to ignore any contrary municipal laws;[112] he also helped pen the argument against Proposition 19, the 2010 California ballot initiative that would have legalized marijuana possession by adults.[113]

Such differences are not inherently condemnable, however. In fact, variances in policy, across jurisdictions and among subjects, can be seen as beneficial under theories of federalism and localism. In a pluralistic society, citizens in different communities are likely to have distinct views on the substance and procedure of criminal justice. The closer a government is to its constituents and the greater the opportunity for citizens to be involved in the decisionmaking process, the more likely that any given policy choice will be attuned to community preferences.[114] Counties and cities might even become laboratories of experimentation in criminal justice.[115] If nothing else, citizens can vote with their feet (assuming they are not shackled), travelling to a different community that adopts policies more in line with their individual preferences.[116] If someone dislikes the acts of prosecutorial decriminalization by Messrs. Williams, Holmes, Cooley, or Heck, their opportunities to lobby for change or relocate elsewhere are far greater than if the decisions had been made at the state or national level.

## VI. PROSECUTORIAL DECRIMINALIZATION ABROAD

Comparisons between the United States and Europe can be enlightening for myriad reasons, not least of which are the marked differences on the other side of the Atlantic. The most disturbing manifestations of overcriminalization, especially the sheer breadth of penal

---

also authorizes resentencing for inmates currently serving life sentences if their third strike conviction was not for a serious or violent offense. *See, e.g.*, Marisa Lagos & Ellen Huet, *'Three strikes' law changes approved by wide margin*, S.F. CHRON., Nov. 7, 2012, at A14.

[112] *See, e.g.*, John Hoeffel, *D.A. Chides L.A. Council, Says He'll Target Pot Stores*, L.A. TIMES, Nov. 18, 2009, at A1.

[113] *See* CAL. SEC'Y OF STATE, ARGUMENT IN FAVOR OF PROPOSITION 19, at 16–17 (2010), *available at* http://cdn.sos.ca.gov/vig2010/general/pdf/english/19-arg-rebuttals.pdf.

[114] Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1510 (1987).

[115] *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[116] *See, e.g.*, Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL'Y 202 (2011).

codes, are largely unheard of in European systems.[117] Indeed, at the same time that scholars of domestic criminal law were decrying overcriminalization, leading comparativists were advocating the examination of continental criminal justice to help America evolve "beyond the Neanderthal stage."[118] The most prominent debate in this area concerned the civil law principle of legality (mandatory prosecution), which was forwarded by several distinguished academics as a means to tame prosecutorial discretion in the United States.[119]

However, recent works have demonstrated that European prosecutors, like their American counterparts, are extremely powerful and possess more discretion than previously thought possible.[120] What is more, this discretion is being exercised in response to a common problem on both continents: too

---

[117] *See* Fernando Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L. REV. 123, 127 (2011). Dean Molina states:

> When I received the invitation to participate in a symposium about overcriminalization, my first thought was that this presented me with an excellent opportunity to share, with foreign colleagues, concerns about a common problem. However, after reading a provocative article by Erik Luna about the overcriminalization phenomenon, especially his amazing catalogue of actions that are considered criminal in the United States, I began to doubt whether, despite talking about the same topic, we are really talking about the same problem.... After reading Douglas Husak's book on overcriminalization in Anglo-American law, the suspicions that Luna's article aroused in me were confirmed. Undoubtedly, most of the overcriminalization questions that arise in the United States are completely unknown to us. They are not a cause of concern to us not because we haven't thought about them, but because we have already solved those problems.

*Id.* at 123–24. *But cf.* VOLKER KREY & OLIVER WINDGÄTTER, RECHTSPOLITISCHES F. [LEGAL POL'Y F.], THE UNTENABLE SITUATION OF GERMAN CRIMINAL LAW: AGAINST QUANTITATIVE OVERLOADING, QUALITATIVE OVERCHARGING AND THE OVEREXPANSION OF CRIMINAL JUSTICE 58 (2012).

[118] Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 374 (1977); *see also* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 543 (1990); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 317 (1995); Gerhard O.W. Mueller, *Lessons of Comparative Criminal Procedure*, 15 AM. U. L. REV. 341, 348 (1966).

[119] *See, e.g.*, DAVIS, *supra* note 34; LLOYD L. WEINREB, DENIAL OF JUSTICE (1977); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974). *Compare* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J 240 (1977), *with* John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J 1549 (1978).

[120] *See* JÖRG-MARTIN JEHLE & MARIANNE WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE (2005); THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 57; Luna & Wade, *supra* note 38, at 1428.

many cases and not enough time and resources. As it turns out, European prosecutors have dealt with their overloaded systems by effectively adjudicating cases and decriminalizing conduct. Sometimes this is done in an obscure fashion, posing the type of legitimacy issues facing American prosecution; but at other times and in other places, such discretionary decisionmaking is exercised openly and honestly. Here, I will briefly mention two examples of overt decriminalization, one from the Netherlands and the other from England. Like the United States, these nations have traditionally recognized prosecutorial discretion (also known as the principle of opportunity).

The comparison raises intriguing questions and possibilities, as well as some potential pitfalls. For instance, although Dutch prosecutors are hierarchically subordinate to a cabinet-level executive (the Minister of Justice), they are officially members of the judiciary and perceive their duty as a magisterial one, which requires non-partisan truth-seeking in the tradition of continental law.[121] Even members of the Crown Prosecution Service, practicing in the birthplace of adversarial adjudication, are not nearly as partisan in their mindset as prosecutors (and defense counsel) operating in America's distinctively combative criminal process.[122] Despite these and other important differences, however, prosecutors in the United States and Europe are relatively comparable—not apples and oranges, so to speak, but different types of apples—where the two groups have parallel roles, powers, and impacts on individuals and society as a whole.

The first foreign example involves rules for marijuana cases in the Netherlands, which more than any other nation uses guidelines to inform the decisions not only of prosecutors, but also those of police, judges, and, most importantly, the public.[123] When the topic of marijuana in the Netherlands comes up, Americans almost invariably assume that the country's legislature has decriminalized drug sales, thereby allowing the existence of Amsterdam's famous "coffee shops." In truth, the use, possession, and distribution of marijuana is illegal by statute,[124] but the

---

[121] *See, e.g.*, Peter J.P. Tak, *The Dutch Prosecutor: A Prosecuting and Sentencing Officer*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 57, at 135, 135–36.

[122] *See, e.g.*, Chris Lewis, *The Evolving Role of the English Crown Prosecution Service*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 57, at 214; Luna & Wade, *supra* note 57, at 439.

[123] *See, e.g.*, Tak, *supra* note 121, at 139, 144–46.

[124] *See* Opium Act (Opiumwet), Stb. 1976, art. 2, *available at* http://www.cannabisbureau.nl/en/doc/pdf/Dutch%20Opium_Act_30556.pdf; *see also Why Are Coffee Shops Allowed?*, OPENBAAR MINISTERIE, http://www.om.nl/vast_menu_blok/english/verzamel/frequently_asked/why_are_coffee_shops/ (last visited Nov. 23, 2012)

Dutch Public Prosecution Service (*Openbaar Ministerie*) has issued rules as to when a case will or will not be prosecuted.[125] The main features of law enforcement policy and its application to drugs are summarized as follows:

> The discretionary principle is an important factor in Dutch criminal law. It allows the Public Prosecution Service to waive criminal proceedings in the public interest. Law enforcement policy gives a high priority to large-scale trafficking in all kinds of drugs and dealing in hard drugs. Sale and possession of cannabis for personal use are much lower priorities. Details of these priorities are published in official guidelines. Dutch policy on law enforcement is therefore more explicit than in some other countries, which operate along the same lines in practice.[126]

Specifically, coffee shop owners may stock up to 500 grams of marijuana and will not be prosecuted for selling the drug, so long as: (1) they do not sell more than five grams per customer per day; (2) they do not sell "hard" drugs; (3) they do not advertise drugs; (4) they ensure that their shop and patrons do not cause a nuisance in the vicinity; and (5) they do not sell marijuana to persons under the age of eighteen or allow them on the premises.[127] If these rules are not observed, the coffee shop can be closed down and the proprietors are liable to be prosecuted.[128] Moreover, Dutch municipalities may apply different rules, including rejecting coffee shops in their jurisdiction, limiting the number of shops, or placing further restrictions on the amount of marijuana that may be stocked.[129] The guidelines thus represent an important model of overt prosecutorial

---

(noting that "possession and sale of small quantities of cannabis in coffee shops are offences under the Opium Act").

[125] *See What Are the Rules Governing Coffee Shops, and How Are They Enforced?*, OPENBAAR MINISTERIE, http://www.om.nl/vast_menu_blok/english/verzamel/frequently_asked/what_are_the_rules/ (last visited Mar. 25, 2012) [hereinafter *Rules Governing Coffee Shops*]; *see also* Robert J. MacCoun, *What Can We Learn From the Dutch Cannabis Coffeeshop System?*, 106 ADDICTION 1899, 1900 (2011); NETHERLANDS MINISTRY OF FOREIGN AFF., FAQ DRUGS: A GUIDE TO DUTCH POLICY (2008), *available at* http://www.minbuza.nl/en/appendices/you-and-the-netherlands/about-the-netherlands/ethical-issues/faq-drugs.html; *Frequently Asked Questions About the Dutch Drugs Policy*, OPENBAAR MINISTERIE, http://www.om.nl/vast_menu_blok/english/frequently_asked/ (last visited Mar. 25, 2012).

[126] *What Are the Main Features of Dutch Policy on Law Enforcement?*, OPENBAAR MINISTERIE, http://www.om.nl/vast_menu_blok/english/verzamel/frequently_asked/what_are_the_main/ (last visited Mar. 25, 2012).

[127] *Rules Governing Coffee Shops*, *supra* note 125.

[128] *Id.*

[129] *See id.*; *Do Different Municipalities Apply Different Rules?*, OPENBAAR MINISTERIE, http://www.om.nl/vast_menu_blok/english/verzamel/frequently_asked/do_different/ (last visited Mar. 25, 2012); *Why Are Fewer Coffee Shops Operating?*, OPENBAAR MINISTERIE, http://www.om.nl/vast_menu_blok/english/verzamel/frequently_asked/why_are_fewer_coffee/ (last visited Mar. 25, 2012).

decriminalization, struck at the national level but still allowing substantial local decisionmaking as to the community impact.

The second foreign example concerns the rules issued by the Crown Prosecution Service (CPS) for prosecuting assisted-suicide cases.[130] Under British law, suicide is legal but assisting in suicide is a specific offense punishable by up to fourteen years' imprisonment.[131] Although assisted suicide was rarely prosecuted, cases denominated as "mercy killings" had been pursued.[132] The issue was further complicated by so-called suicide tourism, where individuals might aid the terminally ill in travelling to other countries that have decriminalized euthanasia.[133] In the 2009 *Purdy* case, the British House of Lords took up a challenge to assisted-suicide prosecutions based on the European Convention on Human Rights.[134] In particular, Article 8 of the European Convention provides that any restrictions on the right to private life must be "in accordance with the law,"[135] where *law* has been interpreted to include sub-statutory and unwritten rules of enforcement.[136]

According to the British Law Lords, the legal rules must be "sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law."[137] In this context, the terminally ill appellant was seeking information "so that she can take a decision that affects her private life" and "make an informed decision as to whether or not to ask for her husband's assistance" without exposing him to the risk of prosecution.[138] Because the existing statutory law did not provide this information and the requisite level of foreseeability, the court's opinion called upon the Director

---

[130] For an in-depth discussion of the Crown Prosecution Service, see Lewis, *supra* note 122.

[131] Suicide Act, 9 & 10 Eliz. 2, c. 60, §§ 1, 2 (1961) (Eng. & Wales).

[132] *See, e.g.*, Colin Fernandez, *Devoted Mother Kay Gilderdale Charged with Attempted Murder of Paralysed Daughter Who Was Bed-Riden for 17 Years*, DAILY MAIL ONLINE (U.K.) (Apr. 16, 2009), http://www.dailymail.co.uk/news/article-1170522/Kay-Gilderdale-charged-attempted-murder-paralysed-daughter.html.

[133] *See, e.g.*, Alison Langley, *'Suicide Tourists' Go to the Swiss for Help in Dying*, N.Y. TIMES, Feb. 4, 2003, at A3; *More Britons Seeking Suicide Help*, BBC NEWS (Nov. 17, 2008), http://news.bbc.co.uk/2/hi/uk_news/7732640.stm.

[134] *See* R. (Purdy) v. Director of Public Prosecutions, [2010] 1 A.C. 345 (H.L.) (appeal taken from Eng.).

[135] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

[136] *See Purdy*, [2010] 1 A.C., at ¶ 41 (Lord Hope).

[137] *Id.* at ¶ 40.

[138] *Id.* at ¶¶ 30–31.

of Public Prosecutions "to clarify what his position is as to the factors that he regards as relevant for and against prosecution."[139]

After the decision was announced, the CPS circulated draft guidelines, received public input, and then issued a synopsis of the relevant law and a set of factors in prosecuting an assisted-suicide case, such as whether the victim was under the age of eighteen, whether the suspect had a history of violence or abuse of the victim, and whether the suspect had been paid to assist in the suicide.[140] Embedded in the guidelines is a disclaimer that "[t]his policy does not in any way 'decriminalise' the offense of encouraging or assisting suicide."[141] But as one leading scholar wrote, "the main significance of [the *Purdy*] case is that it marks a step along the road towards making assisted suicide legal,"[142] and by decreasing the potential scope of British statutory law, the CPS had effectively decriminalized conduct that might otherwise be subject to prosecution.[143]

This prototype of a new "third arm of Anglo-Saxon Law"[144] illustrates the prospects for a dialogic process in prosecutorial decriminalization. Here, the Law Lords prodded the CPS to institute a policy regarding assisted suicide, which it did by promulgating rules amounting to prosecutorial decriminalization. On this side of the Atlantic, American jurists and scholars have argued for greater dialogue between the judicial and political branches, with some U.S. Supreme Court decisions essentially

---

[139] *Id.* at ¶ 55; *see also id.* at ¶¶ 16 (Lord Phillips), 64 (Baroness Hale), 84–86 (Lord Brown), 99–102 (Lord Neuberger).

[140] *See* DIR. OF PUB. PROSECUTIONS, CROWN PROSECUTION SERV., POLICY FOR PROSECUTORS IN RESPECT OF CASES OF ENCOURAGING OR ASSISTING SUICIDE (2010), *available at* http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf; *see also* DIR. OF PUB. PROSECUTIONS, CROWN PROSECUTION SERV., INTERIM POLICY FOR PROSECUTORS IN RESPECT OF CASES OF ASSISTED SUICIDE (2009) [hereinafter INTERIM POLICY FOR PROSECUTORS], *available at* http://www.cps.gov.uk/consultations/as_consultation.pdf; DIR. OF PUB. PROSECUTIONS, CROWN PROSECUTION SERV., PUBLIC CONSULTATION EXERCISE ON THE INTERIM POLICY FOR PROSECUTORS IN RESPECT OF CASES OF ASSISTED SUICIDE (2010), *available at* http://www.cps.gov.uk/consultations/as_responses.pdf. However, it has been argued that the guidelines still have not produced sufficient legal clarity. *See, e.g.*, COMM'N ON ASSISTED DYING, FINAL REPORT: THE CURRENT LEGAL STATUS OF ASSISTED DYING IS INADEQUATE & INCOHERENT 23 (2011), *available at* http://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW_.pdf?1328113363.

[141] DIR. OF PUB. PROSECUTIONS, INTERIM POLICY FOR PROSECUTORS, *supra* note 140, at ¶ 6.

[142] J.R. Spencer, *Assisted Suicide and the Discretion to Prosecute*, 68 CAMBRIDGE L.J. 493, 495 (2009).

[143] *See also* COMM'N ON ASSISTED DYING, *supra* note 140, at 299 (noting that "[t]here is now a broad public perception that assisted suicides that meet the criteria stipulated in the DPP policy are effectively decriminalised").

[144] Lewis, *supra* note 122, at 220.

pursuing such interaction.[145] In the present context, the aforementioned SAM program offers a small-scale example of interbranch dialogue in prosecutorial decriminalization: Philadelphia's district attorney sought input from the state judiciary on the basic idea and then worked with the courts to bring the program to fruition.[146]

With overt decriminalization, another type of dialogue may be important as well—that between the officials formulating the policy and parties with an interest in the end product. As noted, the CPS sought public feedback on its proposed rules. After publishing an interim policy in September 2009, the CPS initiated a twelve-week process of public consultation, which resulted in over 4,800 responses from individuals and organizations, including public health professionals, representatives of religious groups, scholars, public servants, and legal and political actors. These views were taken into account in making adjustments to the final published policy.[147] In the United States, administrative law provides a wealth of experience on the rulemaking processes of executive agencies, where the legitimacy of a given policy "depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall."[148] Although an APA-style system might be unnecessary,[149] the general lessons of American administrative law and the experiences of prosecution offices, both at home and abroad, could inform a thoughtful interactive process for formulating a policy of prosecutorial decriminalization.

Presumably, the decision to undertake such a process would be premised on the belief that a particular offense constitutes overcriminalization and thus provides an appropriate target for prosecutorial decriminalization. As noted earlier, this judgment may depend on whether the crime is deficient in harmful wrongdoing;[150] and on this issue, there

---

[145] *See* Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1126 (2000).

[146] *See supra* note 90 and accompanying text.

[147] *See* Lewis, *supra* note 122, at 224; *DPP's Introductory Remarks on Assisted Suicide Policy*, CROWN PROSECUTION SERV. (Feb. 25, 2010), http://www.cps.gov.uk/news/articles/dpps_introductory_remarks_on_assisted_suicide_policy/.

[148] Sierra Club v. Costle, 657 F.2d 298, 400–01 (D.C. Cir. 1981).

[149] Administrative Procedure Act, 5 U.S.C. §§ 551–706 (2006); *see also* Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 590–623 (2000).

[150] The issue is sufficiently clear to me from my own worldview, which holds that the fundamental unit of moral analysis is the individual, who possesses a right of self-ownership and the freedom to engage generally in capitalist acts with other consenting adults. *See* Luna, *Overcriminalization Phenomenon*, *supra* note 14, at 732–39. But I recognize that many (perhaps most) Americans will disagree with this philosophy or its applications.

appears to be a consensus in a number of areas of overcriminalization, as evidenced by the bunking of otherwise strange bedfellows.[151] With some topics, however, the prospect of agreement seems remote. Consider, for instance, insider trading: Although a respectable argument can be made that it should be no crime at all, neither legislative nor prosecutorial decriminalization of insider trading has any chance in the current political environment.[152] Consider also one of Professor Kadish's original examples of overcriminalization—abortion.[153] Although the issue has been constitutionalized by the Supreme Court, it is hard to believe a consensus could be reached today that abortion lacks harmful wrongdoing.[154]

The United States is hardly the only nation that struggles with normative issues of criminalization and decriminalization. At the time the Law Lords decided *Purdy*, "it was clear that the [British] government did not want to amend the law on assisted suicide due to its high public sensitivity."[155] Since then, the case has generated voluminous debate, including disagreement among intellectual heavyweights.[156] For present purposes, however, the pertinent question is whether it was advisable for the Law Lords to require the Director of Public Prosecutions to announce guidelines for bringing charges of assisted suicide, using *Purdy* as a means to prompt an act of prosecutorial decriminalization. On this issue, one scholar made a strong case for the prior opacity in discretionary decisionmaking:

> [A]ssisted suicide is a rare case. More particularly, it is a case where the real harm sought to be avoided (advantage-taking, social pressure to die, and undervaluing the lives of the terminally ill) is engendered by the formal permissibility of the act far more than many instances of the act itself. Should the escorting of loved ones to suicide clinics continue to take place under the radar, the threat of normalizing controlled death and the danger of its abuse would not loom half as large as it does against a background of open acceptance of that same practice. More certainly, by continuing to hold out even an empty threat of censure, the law would not be forced

---

[151] For example, the American Bar Association, the American Civil Liberties Union, the Cato Institute, the Federalist Society, the Heritage Foundation, the National Association of Criminal Defense Lawyers, and the Washington Legal Foundation. *See* Fields & Emshwiller, *supra* note 12, at A10; Liptak, *supra* note 12, at A1.

[152] *See, e.g.*, Alexandre Padilla, *How Do We Think About Insider Trading? An Economist's Perspective on the Insider Trading Debate and Its Impact*, 4 J.L. ECON. & POL'Y 239, 240 (2008).

[153] Kadish, *Crisis of Overcriminalization*, *supra* note 6, at 162–63.

[154] I take no position here on this controversy.

[155] Lewis, *supra* note 122, at 224.

[156] *Compare* John Finnis, *The Lords' Eerie Swansong: A Note on* R (Purdy) v. Director of Public Prosecutions (Oxford, Legal Research Paper No. 31/2009 & Notre Dame Law School, Legal Studies Research Paper No. 09-39, 2009), *with* Jeremy Waldron, *Torture, Suicide, and Determination*, 55 AM. J. JURIS. 1, 13–19 (2010).

> into the undesirable position of classifying some but not other lives as potentially worthless. In light of this, it is my view that the hitherto unofficial policy of non-prosecution was the correct—indeed, the only viable—answer . . . .[157]

The point is well taken. In some areas, an act of overcriminalization may cover few cases, which are rarely if ever prosecuted, whereas the potential negative consequences of overt decriminalization may be so momentous that one might prefer a low-visibility act of discretionary mercy to deal with each incident as it arises. Interestingly, the Netherlands has its own history of struggling with problems of criminalization and decriminalization, not only with provocative subjects such as abortion and euthanasia, but also with regard to topics that seem considerably less controversial.[158] For example, the Dutch Cabinet pronounced a new policy that would transform coffee shops into private clubs for the local market only, with the goal of stemming drug tourism by foreigners.[159] Robert MacCoun described the change as startling, "because Dutch officials have long resisted international pressure, standing by the coffeeshop model as an expression of Dutch *gedoogcultuur* ('culture of permissiveness') and as a pragmatic 'least worst' solution."[160]

In general, however, the Netherlands has approached criminal justice with a high degree of openness and an acceptance of what might appear contradictory from afar.[161] The Dutch legal culture recognizes that statutory language may be inattentive to the practical necessities of implementation. Deviations from an otherwise strict legislative text are filled by the concept of *beleid* (policy), which achieves a "quasi-legislative" status when expressed in guidelines, notes Dutch law professor Erhard Blankenburg.[162]

> In Dutch understanding penal law is a goal oriented program authorizing the authorities to punish undesired behavior. Prosecution is empowered to charge, not required to do so. At the same time, however, the decision not to prosecute cannot be taken at will: equal treatment under the law, the rules of nondiscrimination, and the principle of predictability of legal action require police prosecutors to follow rules as

---

[157] Kate Greasley, R(Purdy) v DPP *and the Case for Wilful Blindness*, 30 OXFORD J. LEGAL STUD. 301, 323–24 (2010).

[158] Erhard Blankenburg, Beleid—*A Very Dutch Legal Term*, 41 J. LEGAL PLURALISM & UNOFFICIAL L. 65, 67–70 (1998).

[159] *See The Dutch Cabinet: Coffeeshop to Be a Private Club for the Local Market*, MINISTRY OF SEC. AND JUSTICE (May 27, 2011), http://www.government.nl/documents-and-publications/press-releases/2011/05/27/the-dutch-cabinet-coffeeshop-to-be-a-private-club-for-the-local-market.html; *see also* David Jolly, *Hague Court Clears Way for Dutch to Bar Nonresidents From Buying Marijuana*, N.Y. TIMES, April 28, 2012, at A4 (discussing court ruling upholding new policy, which took effect in the southern provinces on May 1, 2012, and will apply to the entire nation in 2013).

[160] MacCoun, *supra* note 125, at 1900 (footnote omitted).

[161] *See, e.g.*, *id.*

[162] Blankenburg, *supra* note 158, at 66.

> to when they apply their penal powers. Thus internal rule making has to supplement the legislative rule. Advocates may challenge the prosecutors' decisions on the basis of precedents and demand publication of the internal guidelines which legitimize them. The pure theory of *beleid* requires every making of a rule to be based on explicit authorization: we might call it a process which is legal but without legislation.[163]

Once formulated, *beleid* can be debated in local political arenas, such as city councils and so-called triangular conferences. During these conferences, the mayor, chief prosecutor, police chief, and oftentimes interested individuals and groups meet to discuss criminal justice policy for their community, as well as to coordinate with regional and national policymakers.[164] Moreover, *beleid* in guideline form provides a benchmark by which to evaluate the performance of government officials, including police and prosecutors. As such, *beleid* does not permit the government "to close its eyes to deviations, but forces it to issue explicit guidelines within which toleration is handled."[165] The guidelines and their application are then open to political and judicial scrutiny as to whether the deviations from statutory law are justified by standard pragmatic rationales.

Of course, a divergence between the law on the books and the law as enforced is not unique to the Netherlands. All legal cultures tolerate some deviations from strict rules; the only question is the approach taken toward the resulting divide. Some legal cultures will simply ignore a gulf between formal law and its enforcement, and others will deal with any contradictions on a case-by-case basis. Both approaches require low-visibility exercises of discretion to cope with overloaded criminal justice systems. By contrast, "pragmatic legal cultures ask for the explication of a policy line (*beleid*) along which toleration is handled."[166] In their daily lives, the Dutch are known for their open curtains,[167] both literal and figurative, and this openness carries over to public affairs, as evidenced by overt decriminalization through prosecutorial guidelines.

## VII. CONCLUSION (AND A CAUTIONARY TALE)

If I had my druthers, the American phenomenon of overcriminalization would be dealt with legislatively, not by executive action. But in an overcriminalized world, created by unrepentant lawmakers and tolerated by

---

[163] *Id.* at 70.

[164] *See id.* at 72.

[165] *Id.*

[166] *Id.* (citation omitted).

[167] *See, e.g.*, Galina Vromen, *A Habit Steeped in History*, REUTERS, May 30, 1991, *available at* http://1.next.westlaw.com (in Reuters News database, enter search: advanced:TI("habit steeped in history")) (discussing Dutch "open curtain culture").

deferential judges, there are simply too many cases and not enough resources to try them all. Prosecutors are already decriminalizing conduct through their discretionary decisionmaking, and, as I said, they have no other choice but to do so. Accepting this as a given, the basic issue is whether prosecutorial decriminalization should remain veiled and ad hoc, generating a secret administrative law of criminal justice; or whether instead prosecutorial decriminalization should be overt, promulgated in a principled fashion, so that both law enforcement and the public know where the line stands between what is criminal and what is not. For now, I will take the latter—prosecutorial decriminalization as a public covenant—guiding law enforcement, communicating honestly with the citizenry, and allowing individuals to conform their behavior to the effective scope of the law.

This approach is more consistent with the rule of law, at least where that much-debated concept is predicated on the values of procedural justice rather than the myth of full enforcement. Overt prosecutorial decriminalization might even serve the principles that sometimes animate the rule of law. It acknowledges the important role played by the executive in a system of separated and coequal branches, where prosecutors are not simply clerical workers but have a distinct constitutional role. Overt prosecutorial decriminalization is also consistent with the core value of federalism, the idea that criminal law enforcement should be local to the maximum extent possible, because government closer to the people is more likely to serve the needs of a particular jurisdiction. Most of all, overt prosecutorial decriminalization increases transparency, allowing the public to see into the black box that is the criminal justice system.

With that said, a word of caution is in order: As unbelievable as it sounds, American prosecutors are not bound by their own rules. In 1979, the U.S. Supreme Court held that law enforcement's violation of agency regulations did not provide a basis for evidentiary exclusion.[168] Because it is up to the executive branch to formulate such rules, making them litigable in criminal cases might result in "fewer and less protective regulations" (or so the Court argued).[169] Since then, the lower courts have uniformly rejected legal claims based on federal prosecutors failing to abide by guidelines issued by the Department of Justice (DOJ).[170] What makes this particularly galling is the fact that the DOJ has invoked its own guidelines

---

[168] United States v. Caceres, 440 U.S. 741, 756–57 (1979).

[169] *Id.* at 755–56.

[170] *See* Ellen S. Podgor, *Prosecution Guidelines in the United States*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE, *supra* note 57, at 16–18; Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 177–85 (2004) [hereinafter Podgor, *Balancing "Discretionary Justice"*].

in congressional hearings as a reason why new statutory restrictions would be unnecessary.[171] Most recently, it argued that a federal statute should be upheld because of the DOJ's tighter construction of the law and the promise that it "neither has brought nor will bring a prosecution" under a broader interpretation.[172]

Unless a prosecution office is willing to police itself, overt prosecutorial decriminalization can set a trap for the legally untutored. A perfect example is provided by the ongoing saga of medical marijuana. To date, eighteen states have decriminalized the medicinal use of the drug, with laws defining eligibility and allowing some means of patient access (i.e., home cultivation, dispensaries, or both).[173] However, the federal Controlled Substances Act still lists marijuana as having "no currently accepted medical use in treatment,"[174] at least for purposes of the U.S. Code, and thus suppliers of the drug are amenable to federal prosecution without exception.[175] Although the Bush Administration had engaged in an aggressive enforcement strategy regarding medical marijuana, then-Senator Obama promised to stop the raids on growers and dispensaries when he became America's chief executive.[176] Shortly after the new administration took office, a White House spokesman reiterated President Obama's position that "federal resources should not be used to circumvent state laws" concerning medical marijuana.[177] The new U.S. Attorney General, Eric Holder, also made clear that federal law enforcement policy would not include raids on medical marijuana organizations.[178]

---

[171] *See* Podgor, *Balancing "Discretionary Justice," supra* note 170, at 199–200.

[172] United States v. Stevens, 130 S. Ct. 1577, 1591 (2010) (quoting government brief). With good reason, the Court rejected this argument.

[173] *18 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits*, PROCON.ORG (Nov. 16, 2012, 2:36 PM), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Mar. 25, 2012).

[174] *See* 21 U.S.C. § 812(b)(1)(B), (c) (2006).

[175] *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486 (2001) (rejecting necessity defense for medical marijuana); *see also* Gonzales v. Raich, 545 U.S. 1, 9 (2005) (rejecting Commerce Clause challenge).

[176] *See* Michael Vitiello, *Legalizing Marijuana: California's Pot of Gold?*, 2009 WIS. L. REV. 1349, 1359–60.

[177] Stephen Dinan & Ben Conery, *Bush Holdovers at DEA Continue Pot Raids: Obama Vowed to End Policy*, WASH. TIMES, Feb. 5, 2009, at A1.

[178] *See* Trip Jennings, *Don't Expect DEA Raids on N.M. Medical Marijuana Dispensaries*, N.M. INDEP. (June 5, 2009), http://newmexicoindependent.com/28991/dont-expect-dea-raids-on-nm-medical-marijuana-dispensaries; Josh Meyer & Scott Glover, *U.S. Won't Prosecute Medical Pot Sales*, L.A. TIMES, Mar. 19, 2009, at A1; Chris Roberts, *Blowing Smoke: Obama Promises One Thing, Does Another on Medical Marijuana*, S.F. WEEKLY (Apr. 6, 2011), http://www.sfweekly.com/2011-04-06/news/medical-marijuana-raids-obama-eric-holder-legalization-dispensaries-chris-roberts/.

In October 2009, Holder's chief lieutenant, David Ogden, issued a memorandum emphasizing that federal prosecution must be efficient and rational in the use of limited investigative and prosecutorial resources.[179] U.S. Attorneys were instructed that the general rule should be non-prosecution of "individuals whose actions are in clear and unambiguous compliance with existing state laws that provide for medical use of marijuana."[180] To help distinguish legitimate medical marijuana activity from illegal drug trafficking, the memo set out several factors that might indicate a federal interest in prosecution, such as unlawful possession or use of firearms, the presence of violence, sales to minors, and ties between marijuana and other criminal enterprises.[181] The document concluded by stating that it does not "legalize" marijuana—but if it were abided by, the Ogden Memo would be a form of prosecutorial decriminalization of marijuana used for medical purposes under state law. And that is precisely how some medical marijuana providers and state government officials understood the national law enforcement policy of the Obama Administration.[182]

An entirely different message would be sent in the coming months and years, however, one backed by the full force of the U.S. Code. Federal law enforcement began cracking down on medical marijuana dispensaries, prosecuting the proprietors and seeking forfeiture of business properties.[183] When Washington was considering legislation to license marijuana growers and dispensaries, the state's two U.S. Attorneys threatened to prosecute "vigorously" those who participate in the manufacture and distribution of marijuana, "even if such activities are permitted under state law."[184] Ominously, they claimed that "state employees who conducted activities

---

[179] *See* Memorandum from David Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1 (Oct. 19, 2009).

[180] *Id.*

[181] *Id.*

[182] *See, e.g.*, Roberts, *supra* note 178.

[183] *See, e.g.*, Amanda Bronstad, *Feds Continue Crackdown Against Medical Pot Stores*, RECORDER, Jan. 23, 2012, at 3; Erik Eckholm, *Medical Marijuana Industry Is Unnerved by U.S. Crackdown*, N.Y. TIMES, Nov. 24, 2011, at A22; John Ingold, *Feds Justify Dispensary Crackdown*, DENVER POST, Jan. 20, 2012, at 1B; Jennifer Medina, *U.S. Attorneys in California Set Crackdown on Marijuana*, N.Y. TIMES, Oct. 8, 2011, at A10; Roberts, *supra* note 178; William Yardley, *New Federal Crackdown Confounds States That Allow Medical Marijuana*, N.Y. TIMES, May 8, 2011, at 13.

[184] Letter from Jenny A. Durkan, U.S. Att'y, W.D. Wash. & Michael C. Ormsby, U.S. Att'y, E.D. Wash., to Wash. Gov. Christine Gregoire, Re: Medical Marijuana Legislative Proposals 1 (Apr. 14, 2011).

mandated by the Washington legislative proposals would not be immune from liability under" federal drug law.[185]

Recently, a federal district court pointed to the Ogden Memo's disclaimers as proof that a "reasonable person . . . could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes."[186] Indeed, the crackdown might be squared with a tight reading of the Ogden Memo, at least when supplemented by a subsequent DOJ memorandum.[187] But for many people, the change had the feel of a bait-and-switch with penal consequences.[188] Overcriminalization is bad, but the perceived failure of law enforcement to follow its own rules only makes things worse.[189]

---

[185] *Id.* at 2.

[186] Montana Caregivers Ass'n v. United States, 841 F. Supp. 2d 1147, 1149 (D. Mont. 2012); *see also* United States v. Washington, No. CR 11–61–M–DLC, 2012 WL 3610252, at *8–18 (D. Mont. Aug. 22, 2012) (rejecting estoppel claim); Sacramento Nonprofit Collective v. Holder, 855 F. Supp. 2d 1100, 1111–12 (E.D. Cal. 2012) (same); Marin Alliance for Medical Marijuana v. Holder, No. C 11–05349 SBA, 2011 WL 5914031, at *7–10 (N.D. Cal. Nov. 28, 2011) (same); United States v. Stacy, 734 F. Supp. 2d 1074, 1077–82 (S.D. Cal. 2010) (same); *cf.* United States v. Williams, No. CR 12–08–H–DLC, 2012 WL 3963323, at *1–3 (D. Mont. Sept. 11, 2012) (rejecting Guarantee Clause challenge).

[187] Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use, 1–2 (June 29, 2011); *see also Montana Caregivers*, 2012 WL 169771, at *2 n.1; Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 MCGEORGE L. REV. 109, 115–17 (2012).

[188] *See, e.g.*, Roberts, *supra* note 178; Jacob Sullum, *Read My Tea Leaves*, REASON.COM (Oct. 12, 2011), http://reason.com/archives/2011/10/12/read-my-tea-leaves. Robert Weisberg has suggested that California's Proposition 215, which would have legalized non-medical marijuana, might have been "so direct an insult to the federal prohibition [scheme]," that law enforcement had to "at least threaten[] a much tougher enforcement policy." Robert Weisberg, *Approaches to Assessing the Effects of Marijuana Criminal Law Repeal in California*, 43 MCGEORGE L. REV. 1, 7 (2012).

[189] *Cf.* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."); Luna, *Transparent Policing*, *supra* note 34, at 1154–63 (discussing costs of citizen distrust of law enforcement).